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In the

Supreme Court of The United States

October Term, 1970

No. 830

MAYLAND L. CLARK, *Petitioner*

vs.

ALBERT GULESIAN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Petitioner, Mayland L. Clark, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 15, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Maine.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on July 15, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether it is an unconstitutional denial of due process and the equal protection of the law for a malpractice statute of limitations to run from the date of the wrong, rather than the date of discovery, where the injured party is unaware and cannot be expected to be aware of the injuries prior to the running of the statutory period.

STATUTORY PROVISIONS INVOLVED

Maine Revised Statutes Annotated, Title 14, § 753. Two years

> Actions for assault and battery, and for false imprisonment, slander, libel and malpractice of physicians and all others engaged in the healing art shall be commenced within 2 years after the cause of action accrues.

STATEMENT OF THE CASE

On August 4, 1952, Petitioner was running along a

brook with his mother, his brother and two sisters, when he fell over a log. Petitioner was taken to the hospital and examined by the Respondent. An operation was performed at which time it was discovered that Petitioner had punctured his jejunum. The puncture was repaired and the incision closed except for a drain, which was subsequently removed. Although healing was slow, it appeared complete, and Petitioner was finally discharged later in the fall of 1952.

Petitioner never recovered his health after the operation. He lacked ambition and was sick most of the time. Finally, on January 13, 1969, Petitioner became so sick that he could not eat; he weighed approximately 80 pounds. At this time, he was admitted to the hospital for a period of approximately ten weeks in order to build up his strength. Thereafter, he was discharged for one month and then brought back for an exploratory operation. During the course of this operation, which was the second time Petitioner had ever been operated on, it was discovered that Plaintiff had a towel 56 by 34 centimeters in his abdomen.

Because of the towel in Plaintiff's abdomen, his digestive system did not function properly. His growth was stunted as a result of nutritional deficiencies. Petitioner is only five feet two inches tall, while his entire family is substantially taller. After the towel was removed, Petitioner grew one inch, although he was twenty-seven years of age.

At the time of the accident and the original operation, Petitioner was ten years old. The towel was discovered approximately seventeen years later, at which time Petitioner was twenty-seven years old. During the intervening period, Petitioner was examined by other doctors, but the existence of the towel could not be discovered because it was not revealed by x-ray examination.

Petitioner commenced suit in the United States District Court for the District of Maine on the basis of diver-

sity of citizenship and amount in controversy to recover for the damage caused by Respondent's negligent failure to discover and remove the towel. Respondent asserted as an affirmative defense that any remedy to which Petitioner might be entitled was barred by the statute of limitations governing malpractice actions. Respondent moved to dismiss the complaint for failure to state a cause of action. A stipulation admitting the Petitioner's age and the date of the accident was filed by the parties, and the District Court, treating the Respondent's motion to dismiss as a motion for summary judgment, dismissed the Petitioner's complaint. Petitioner appealed to the Court of Appeals for the First Circuit which affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

(1) *There is a substantial question about the constitutionality of the "time of the act" rule.*

Due Process

The phrase "due process" is broad, untechnical, and perhaps incapable of precise definition. It embodies notions of "fair play" and "principles of liberty and justice fundamental to a scheme of ordered liberty." See, *e.g.*, *Palko v. Connecticut*, 302 U. S. 319 (1937); *Snyder v. Massachusetts*, 291 U. S. 97 (1934); *Hurtado v. California*, 110 U. S. 516 (1883). As stated by Justice Frankfurter, due process includes those procedures required for the "protection of ultimate decency in a civilized society." *Adamson v. California*, 332 U. S. 46, 61 (1947) (concurring opinion).

The absence of definitional precision is perhaps the best evidence that the concept of due process itself is not static or frozen into a temporal or historical contect. The very essence of "due process" is that it reflects the prevailing moral commandments of the day rather than the fixed jural precepts of the past. It is not poured in the mold of

the common counts, but is rooted in the principle of applying a contemporary sense of fairness and a "standard for judgment in the progressive evolution of the institutions of a free society." *Malenski v. New York*, 324 U. S. 401, 414 (1945).

A procedural rule which requires an individual to bring a cause of action within a period during which he does not know, and through the exercise of reasonable care could not know, that he had a cause of action constitutes a denial of due process. The liquidation of a cause of action for an "inherently unknowable" harm before one discovers that it exists is an elusive and illusory remedy and one which most courts today find repugnant to our sense of justice and fairness. See, *e.g.*, *Johnson v. St. Patrick's Hosp.*, 148 Mont. 125, 417 P. 2d 469 (1966); *Ayers v. Morgan*, 397 Pa. 282, 154 A. 2d 788 (1959); *Johnson v. Caldwell*, 371 Mich. 368, 123 N. W. 2d 785 (1963); *Fernandi v. Strully*, 35 N. J. 434, 173 A. 2d 277 (1961).

Due Process is not necessarily determined by taking a balance sheet accounting of the position held by the various jurisdictions. Nevertheless, our courts often look to corresponding federal and state court practices to gain a consensus of contemporary standards and prevailng concepts of fairness. See, *e.g.*, In re *Oliver*, 333 U. S. 257, 267-68 (1948); *Wolf v. Colorado*, 338 U. S. 25 (1949); *Snyder v. Massachusetts*, 291 U. S. 97 (1934); *Powell v. Alabama*, 287 U. S. 45, 70 (1932); *Solesbee v. Balkcom*, 339 U. S. 9, 14 (1950) (dissenting opinion, Frankfurter, J.).

In this regard, it is interesting to note that one court, when confronted with the issue of deciding the time at which the period of limitations started to run in medical malpractice cases involving "foreign objects" reviewed all of the state and federal rulings in similar cases. The court found that only 16 states still adhered to the "time of the negligent act" rule and that in many of those states the rule had been engrafted with many exceptions in order to alle-

viate the obvious injustice imposed by the rule. See *Berry v. Branner*, 245 Ore. 307, 421 P. 2d 996 (1966). And for more recent cases rejecting the "time of the act" rule see *Flanagan v. Mount Eden Gen. Hosp.*, 24 N. Y. 22 427, 301 N. Y. S. 2d 23, 248 N.E.D. 871 (1969); *Burke v. Washington Hosp. Ctr.*, 293 F. Supp. 1328 (D.D.C. 1968); *Ruth v. Dight*, 453 P. 2d 631 (Wash. 1969).

Most of the cases cited in the *Berry* decision, *supra* indicate that the "time of the act" rule is "illogical", "unfair", "unjust", "patently unrealistic", "completely unreasonable", and amounts to a "mockery of the law". While these courts in refusing to adhere to the "time of the negligent" act rule did not find it necessary to place their rulings within a constitutional text, it seems clear that the terminology employed in rejecting the ancient and outmoded rule embraces the very essence of due process.

The constitutional issue presented by cases similar to the instant one, however, has not gone unnoticed. In *Ayers v. Morgan*, 397 Pa. 282, 154 A. J/2d/J/ 788 (1959), Justice McBride, in his concurring opinion, reasoned that since the Pennsylvania Constitution provided that "all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law; a judician interpretation that the statute of limitations had expired prior to discovery of the foreign object would render the statute unconstitutional.

> Statutes of limitations must be read in the light of this provision for the running of time is not the only test of validity of such statutes. They are desirable in that they prevent oppression by forbidding plaintiffs to litigate stale claims and thus compel defense at a time when such defense is no longer practicable and sometimes even impossible. Nevertheless, the restrictions imposed may not be so arbitrary as to preclude a reasonable opportunity for one who has been harmed to make his

> claim. If the legislature were permitted absolute discretion it would not be merely regulating the remedy but would be abolishing it. . . . This may not be done either in a statute which operates retrospectively or one which operates prospectively for in either event it would amount to a *denial of justice*. The legislature could not have intended such a result. Although courts will not inquire into the wisdom of a statute, nevertheless they do have power to declare a statute unconstitutional as applied to a given case, or *alternatively, to interpret the statute so as to include an essential requirement which would make its applicational constitutional*. I believe this case requires us to adopt this alternative course. [Emphasis added].

See also *Heck v. Schupp*, 394 Ill. 296, 68 N. E. 2d 464 (1946); *Daily v. Parker*, 61 F. Supp. 701 (Ill. 1945).

The right of every individual to have his day in court to seek redress for harm caused by another is the very keystone of our jurisprudence. If the door to our courts is to be closed, it cannot be slammed in an arbitrary or unreasonable manner. Moreover, the Fourteenth Amendment will not be satisfied by a court simply invoking the state's common-law policy. *Shelly v. Kraemer*, 334 U. S. 1 (1948); *American Fed. of Labor v. Swing*, 312 U. S. 321 (1940); *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

Depriving a man of a legal remedy before he knows, or reasonably can be expected to know, that he has a cause of action "cannot be reconciled with the traditional purposes of the statute of limitations." See *Urie v. Thompson*, 337 U. S. 168 (1948).

It is clear that it is arbitrary and unreasonable to maintain that the need for repose would be violated unless the period of limitations runs from the date of the negligent

act against a party who does not know and reasonably cannot know that he has suffered a wrong. The mark of our jurisprudence is that it responds to the "felt necessities of the times," and neither our courts nor legislatures can offer us the dead hand of the past in responding to the realities of societal practice, progress and conscience. *Cf.*, Holmes, Jr., in *Missouri v. Holland*, 252 U. S. 416, 433 (1920). The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Equal Protection

The construction given to the medical malpractice statute of limitation by the Maine Supreme Judicial Court constitutes state action, which must be a reasonable exercise of the state's police power. *Shelly v. Kraemer*, 334 U. S. 1 (1948); *Twining v. New Jersey*, 211 U. S. 78 (1908).

In the instant case, Petitioner falls within that group of persons who have a cause of action for which the courts refuse a remedy, or provide an illusory one at best. The Maine Supreme Judicial Court has by judicial interpretation classified him within the same category as those persons who have been dilatory in seeking redress for their injuries. Perhaps in a broader sense, it can be argued that Petitioner is actually *excluded* (by virtue of his ignorance of an injury) from the class of the general public that has access to our courts for redress of their injuries. But whether the Petitioner is said to be included in the same class of persons that has knowledge of a claim or excluded from the class of the entire population that has access to the courts, the end result remains the same: the classification is unreasonable and arbitrary and constitutes unfair discrimination against him.

The distinction between a Plaintiff who knew or reasonably should have known of an injury and failed to seek redress and the Plaintiff who did not know and could not

reasonably have been expected to know of an injury is too obvious to demand elaboration. To treat these two different classes of people in the same manner does not result in similar treatment for persons similarly situated. *Cf. Hartford Steam Boiler Inspection and Ins. Co. v. Harrison*, 301 U. S. 459 (1936). As suggested above, it is no less discriminatory for the state to place individuals on an artificial parity when their circumstances and opportunities are inherently unequal.

The law often indulges in presumptions, but the presumptions must rest upon a foundation of reasonability in logic or experience. It is an exercise in causitry, however, to conclude that all individuals are given a reasonable opportunity to litigate their claims when, because of the very nature of the harm suffered, one class does not have any knowledge that a wrong has been commited. A right so fundamental as the right to a day in court cannot be extinguished by such a facile application of the label of equal opportunity. It is unequal and unreasonable treatment because this general classification ignores the realities of contemporary problems and fastens onto a barnacled rule of construction that sits on age instead of analysis.

The majority of courts today have rejected the rule that individuals who suffer inherently unknowable harms at the hands of physicians must be treated in the same manner as those who have slept on their right to redress. Although the rejection of the "time-of-the-act" rule is not expressed in terms of equal protection of the law, nevertheless, the courts apparently recognize that similar treatment of persons dissimilarly situated is unreasonable and violates all notions of fairness and justice.

As the Supreme Court of Delaware stated:

> To say that the Plaintiff has two years after the 'claimed' injury within which to maintain an action, and, at the same time, to say that the injury must be 'claimed' before she has, or can reason-

> ably be expected to have, knowledge of any wrong inflicted upon her, is contrary to *reason* and *justice*. It is *unreasonable*, we think, to assume that the General Assembly intended to grant a remedy for a wrong but to bar the remedy before the wrong was physically ascertainable by due diligence. To ascribe to the General Assembly any such *unjust* intent . . . seems to us *completely unreasonable*. *Layton v. Allen*, 246 A. 2d. 794 (Del. 1968) [Emphasis added].

The Supreme Court of Oregon held that taking away a cause of action under circumstances similar to the case at bar made a *mockery of justice*. *Berry v. Branner*, 245 Ore. 307, 421 P. 2d 996 (1966). See also *Fernandi v. Strully*, 35 N. J. 434, 173 A. 2d 277 (1961). (Justice cries out that she fairly be afforded a day in Court). And see *Urie v. Thompson*, 337 U. S. 168 (1948); *Johnson v. St. Patrick's Hosp.*, 148 Mont. 125, 417 P. 2d 469 (1966).

From the foregoing, it can be seen that the Courts recognize that it is unreasonable and unjust to deprive a man of his cause of action before he has knowledge of its existence. And as this Court has said such a course of conduct cannot be reconciled with traditional notions of the purposes of limitations. *Urie v. Thompson*, 337 U. S. 168 (1948).

These observations reflect the reasoned application of today's law with the art of medicine. The contrary view is merely "blind imitation of the past." While it is not a denial of equal protection to deprive the tardy of their remedy, it is arbitrary and unreasonable to continue to apply an ancient rule to a state of acts never envisioned.

(2) *Many people are affected by the issue presented by the instant case.*

The state courts disagree as to when a cause of action accrues in the "foreign objects" cases. A review of the au-

thorities indicates that approximately 34 states adopt the "time of discovery" rule, and that only 16 adopt the "time of the act" rule. See *Berry v. Branner*, 245 Ore. 307, 421 P. 2d 996 (1966); *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N. Y. 2d 427, 301 N.Y.S. 2d 23, 248 N. E. 2d 871 (1969).

As the above cases illustrate, the problem of the accrual of a cause of action in a foreign object case is not isolated. If the "time of the act" rule were held unconstitutional it would affect innumerable victims in the 16 states still adhering to "time of the act" rule.

(3) *The class of persons injured by the application of the "time of the act" rule are least able to afford the loss and therefore most in need of review of this rule.*

The victims of "foreign objects" malpractice as a class are frequently left with partial or permanent disability. This occurs at a time when there are frequently substantial bills for curative medical treatment. The economic loss which is inflicted on the victim and his family is such that this court would be warranted in granting the writ on behalf of the entire class.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,
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APPENDIX

OPINION

ALDRICH, *Chief Judge.* This is a diversity action for malpractice. In 1952, when the plaintiff was ten years old, he was given emrgency surgical treatment by the defendant physician. Allegedly his health was poor thereafter, and in 1969 he underwent further surgery. Allegedly at this time a towel was discovered in his abdomen which had been left there during the original operation and which had continuously interfered with his digestive system, and consequently caused his poor health. Defendant pleaded the Maine statute of limitations. Concededly this statute applies, and, concededly, under it, even under such circumstances as this, the cause of action accrues at the time of the wrongful act. *Tantish v. Szendey*, 1962, 158 Me. 228; *cf. Tessier v. United States*, 1 Cir., 1959, 269 F. 2d 305, 309. The district court dismissed the complaint, and plaintiff appeals.

Plaintiff's first argument on this appeal is that the Maine statute, as interpreted and applied in *Tantish*, is unconstitutional as a denial of equal protection and due process. For this novel contention he cites no direct authority of any sort. While state courts disagree in their approach as to when, under circumstances such as these, the cause of action accrues, defendant points out that no majority opinion has based its decision on constitutional grounds. For a recent review of authorities see *Flanagan v. Mount Eden General Hospital*, 1969, 24 N. Y. 2d 427 (adopting a contrary rule). As we pointed out in *Tessier*, ante, at 310, this is a policy decision. The rights are not one-sided. Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. Such a conclusion does not deprive the plaintiff of any constitutional right to fair or equal treatment.

The plaintiff's alternative claim is that the statute has not run because there has been a continuing injury. The asserted continuing duty to remove a foreign object is inconsistent with the rule established by *Tantish*, since it would avoid the bar of the statute of limitations in every such case. We must therefore reject a continuing negligence theory which is based solely on the initial wrongful act. In fact, the Maine court, in surveying the law of other states, explicitly rejected this approach, although the issue had not been raised by the plaintiff there. *Tantish*, ante, at 236.

Finally, the plaintiff can have no claim for continuing negligence apart from the constructive one of a duty based upon the original conduct. There has been no separate act of malpractice in connection with subsequent treatment. In fact the plaintiff has not even seen the defendant since 1957.

In this case we inaugurate the practice established by our new Local Rule 6, paragraph 2d, which, in turn, is patterned upon the practice in some other circuits, notably the Fifth. Where we find the issues to be manifestly simple and clear, and the parties' legal citations, supplemented by our own research, fully dispositive of those issues, and the members of the court unanimously conclude that no useful purpose could be served by oral argument, oral argument will be dispensed with. We find this to be such a case.

The judgment of the district court is affirmed.

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was submitted to the Court.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
DANA H. GALLUP, *Clerk*
By: /s/ Francis P. Scigliano
Chief Deputy Clerk

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ALBERT GULESIAN, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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October 30, 1970

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is now reported at 429 F.2d 405 (1970). No formal opinion was rendered by the District Court for the District of Maine, but on Defendant's motion, treated as a motion for summary judgment, District Judge Gignoux stated: "Hearing had Motion granted and action dismissed *Tantish v. Szendy*, 158 Me. 228 (1962); *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1958)".

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the statute of limitations as applied to malpractice actions in the State of Maine is an unconstitutional denial of due process and the equal protection of the law, where the injured party is unaware and cannot reasonably be expected to be aware of the injuries prior to the expiration of two years? (This is the exact language of Petitioner in his appeal to the Court of Appeals for the First Circuit.)

STATUTORY PROVISIONS INVOLVED

These are set forth in the Petition.

STATEMENT OF THE CASE

Most of the statements contained in the first four paragraphs of Petitioner's Statement of the Case are not contained in the pleadings. The basic facts are that on August 4, 1952, Respondent osteopathic physician operated on Petitioner (who had been born February 5, 1942) to repair a puncture wound in the abdominal area. Respondent at that time allegedly left a towel within the abdomen of Petitioner. Petitioner allegedly did not know and through the exercise of reasonable care could not have known about the presence of the towel until it was discovered on May 8, 1969 during general exploratory surgery. Respondent hasn't seen or treated Petitioner for anything since 1957.

ARGUMENT

Petitioner does not cite one shred of authority in support of the "novel contention" he is making here. He seeks to have this Court here establish a novel principle of law in spite of the total absence of lower court or state court or other authority or holdings in his favor. As Chief Judge Aldrich said in the decision below:

> "Plaintiff's first argument on this appeal is that the Maine statute, as interpreted and applied in *Tantish*, is unconstitutional as a denial of equal protection and due process. For this novel contention he cites no direct authority of any sort. While state courts dis-

agree in their approach as to when, under circumstances such as these, the cause of action accrues, defendant points out that no majority opinion has based its decision on constitutional grounds." (Underlining added)

There have been many cases, especially in recent years, considering the question of when a medical malpractice statute of limitations commences to run; many were foreign object cases. They arrived at a variety of results on a variety of theories. Some states, such as Maine, Massachusetts, Wisconsin, New Mexico, Missouri, New Hampshire and Virginia within the last ten years—and others previously—applied the "time of the act" rule. Others, perhaps the majority recently, applied the "discovery" rule. Still others adopted various exceptions to the "time of the act" rule. While the courts construe their malpractice statutes in various ways, on one thing they are uniform and unanimous—we do not find a single leading case in a single American jurisdiction decided on constitutional grounds or, in fact, finding or even hinting at a constitutional problem. (So as not to unduly prolong this Brief we have collected these cases in the Appendix hereto.)

The courts unanimously recognize this "is a policy decision" (Chief Judge Aldrich in opinion below) and a question of statutory interpretation—not a constitutional question. Some courts specifically reject the constitutional argument.

> "We do not doubt that the legislature possesses the constitutional power to strike the balance one way or the other and by establishing a clear line of demarcation to fix a time certain beyond which no remedy will be available". *Ruth v. Dight*, 453 P.2d 631 (Wash. 1969)

See also, e.g., *DeLong v. Campbell*, 157 Ohio St. 22, 104 N.E. 2d 177 (1952); *Reistad v. Manz*, 11 Wis. 2d 155, 105 N.W. 2d 324 (1960). Other courts—and this would seem in some degree to include almost all—while not specifically mentioning any constitutional arguments, make it clear this is simply a question of statutory interpretation, that the legislature has the constitutional power to make the determination, and that when the statute is clear the courts have no room for interpretation. The question for interpretation where there is

ambiguity is when did the action "accrue" or the statute "begin to run". See, e.g., *Yoshizaki v. Hilo Hospital*, 433 P.2d 220 (Hawaii 1967), *Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 248 N.E. 2d 871 (1969), *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961)

It is difficult to believe that all the courts in all the cases, including those adopting the "discovery" rule, either rejected, missed or ignored a meritorious constitutional point. It is difficult to believe they would continually say it is up to the legislature, without indicating a limit, if there is a valid constitutional objection.

The Supreme Judicial Court of Maine in a recent case, after very carefully considering the arguments and policy considerations on both sides, rejected the "time of discovery" argument. *Tantish v. Szendey*, 158 Me. 228, 182 A.2d 660 (1962). This result had been forecast by the First Circuit. *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1959).

The only malpractice case Petitioner cites indicating there might be a constitutional problem is *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959). It is certainly of significance that the opinion quoted is that of a concurring Justice, not of the Court itself, since the majority opinion didn't raise the point. Furthermore, it is the Pennsylvania Constitution that is referred to, not the United States Constitution. Finally and most significantly, we find that in the medical malpractice limitations field, *Ayers* is one of the most cited cases—but never once, so far as we have found, has a majority opinion cited it on a constitutional issue, never once has a court's opinion cited the McBride concurrance or given it any credence whatsoever. It is stated in 80 *A.L.R.* 2d 368, 387 that "no case supporting this view has been found . . . ."

It does not seem to us that *Urie v. Thompson*, 337 U.S. 163, 93 L.Ed. 1282 (1949), where recovery was sought under the Federal Employers' Liability Act, furnishes any support for Petitioner; *Urie* involved statutory construction and not constitutional issues. This Court was there interpreting that Act to determine "the day the cause of action accrued", just as the many state courts have interpreted state statutes; there is no implication Congress could not have constitution-

ally provided a different time of accrual. In the second place, unlike a foreign object case, the Plaintiff there had a disease that had arisen from "continuous inhalation of silica dust" over the years and it was apparently impossible to tell just when the act or acts causing the disease had occurred—possibly they had actually been within the three years. We do not contend that on facts analogous to *Urie* (that is, continuous treatment and continuous acts up to a time within the limitations period, together with the impossibility of determining which acts caused the harm), the Supreme Judicial Court of Maine might not agree with *Urie;* suffice it to say a foreign object case is not that type of case.

In *Wilcox v. Plummer*, 29 U.S. (4 Peters) 172, 7 L. Ed. 821 (1830) (involving malpractice of an attorney), this Court cites as authority a case where "the plea of the statute was sustained though the proof established that it was unknown to the plaintiff until the time had run out".

Finally, it seems Petitioner may miss—or at least avoid—the point here. He says at pages 6 - 7 of his Petition that "it is arbitrary and unreasonable to maintain that the need for repose would be violated unless the period of limitations runs from the date of the negligent act . . . ." Of course, we don't maintain that at all. What we maintain is that it is up to the legislature to determine when the period starts to run and that it is not unconstitutional to determine that it starts at the time of the negligent act.

1. THE DECISION BELOW IS CLEARLY CORRECT

As an indication of how clear the First Circuit thought this matter, they chose this case as an occasion to "inaugurate" their new practice of dispensing with oral argument where they found "the issues to be manifestly simple and clear . . . ."

Going outside the malpractice field, Petitioner hasn't cited a single case dealing with a single statute of limitations in any field holding that the statute violated the due process or equal protection provisions of the United States Constitution.

There is no question an application of a limitations statute can be hard on an innocent plaintiff. But statutes of limitation are almost always hard—they are intended to be. They are intended to cut off meritorious claims as well as other ones. They are based on a long-established, firmly-rooted public policy. Justice Jackson stated in *Chase Securities Corp v. Donaldson*, 325 U.S. 304, 314, 89 L.Ed. 1628, 1635 (1945):

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost . . . . They are by definition arbitrary and their operation does not discriminate between the just and unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. (Underlining added)

A basic difficulty with Petitioner's argument is that he is classifying limitations acts solely from the point of view of plaintiffs and also considering only their requirement of some degree of diligence. He ignores the fact that in determining classifications the defendant must also be considered, as must the interest of the general public; otherwise, there is little reason for limitations acts. The legislature should be and always has been allowed wide discretion in determining where to draw the lines in limitation acts.

In *Kavanagh v. Noble*, 332 U.S. 535, 68 S.Ct. 235, 92 L.Ed. 150 (1947), with reference to a limitations period in the Internal Revenue Code, this Court said:

> "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary . . . . Remedies for resulting inequities are to be provided by Congress, not the courts."

The State of Maine is certainly very concerned with the standard of health care within its borders, since that helps determine the health of its citizens. It would seem to be well within its power to take reasonable steps to assure its high standards. Without a healthy medical community we are unlikely to have a healthy community. If this statute will—or even may—reasonably further such a basic concern, there would seem to be no question of its constitutionality. In determining classifications and where to draw the lines in this area of great public interest the legislature should be allowed especially wide discretion.

Petitioner contends that here Maine has refused a remedy or provided "an illusory one at best". It is interesting to note other instances where this Court and other courts have allowed a remedy to be totally abolished.

We are delighted to see that Petitioner apparently considers the alienation of affections and breach of promise to marry cases relevant (see *Hick* and *Daily* cases on page 6 of Petition), since they seem very analogous to us and since the overwhelming majority of the jurisdictions hold their abolition constitutional. After citing cases upholding such statutes in at least six states, the Court in *Goldberg v. Musim*, 162 Colo. 461, 427 P.2d 698 (1967), says: "Apparently Illinois is the only state which has declared such an act unconstitutional."

The New York court, in perhaps the leading case on the constitutionality of such statutes, concerning breach of promise, said:

> "The legislature, however, in dealing with the subject must have in mind the general welfare. It must determine what is for the best interest of the people of the state as a whole . . . .
>
> ". . . Not all causes of action and rights which existed at common law are beyond legislative control".

Fearon v. Treanor, 272 N.Y. 268, 5 N.E. 2d 815 (1936), reh. den. 273 N.Y. 528, 7 N.E. 2d 677 (1937), remittitur amended (To allegation the statute violated the Fourteenth Amendment "because the right to damages for breach of contract to marry constitutes a property, or common-law, right",

the Court "held that the law aforesaid is not repugnant to the Constitution of the United States.") 273 N.Y. 645, 8 N.E. 2d 36 (1937), app. dism'd ("The appeal herein is dismissed for the want of a substantial federal question.") 301 U.S. 667, 81 L.Ed. 1332, 57 S.Ct. 933 (1937), reh. den. 302 U.S. 774, 82 L. Ed. 600, 58 S. Ct. 6 (1937). New York also held the statute constitutional as applied to actions for alienation of affections and criminal conversation. *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E. 2d 47 (1937), remittitur amended (to include "This court held that such laws are not repugnant to, or violative of, the Fourteenth Amendment to the Constitution of the United States".) 274 N.Y. 570, 10 N.E. 2d 556 (1937), appeal dismissed 302 U.S. 641, 58 S. Ct. 57, 82 L. Ed. 398 (1937).

But this is not the only situation where the United States Supreme Court has upheld abolition of a remedy. This Court in *Fearon* and in *Hanfgarn* each time in dismissing for want of a substantial federal question cited three cases. *Second Employers' Liability Cases*, 223 U.S. 1, 50, 32 S. Ct. 169, 56 L. Ed. 327 (1912) sustained a basic change of remedy against constitutional attack. *New York Central R. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917) upheld the constitutionality of the New York Workmen's Compensation Act, which, of course, drastically affected common law rights and remedies. Perhaps the most interesting case here is *Silver v. Silver*, 280 U.S. 117, 50 S. Ct 57, 74 L. Ed. 221 (1929), upholding a Connecticut statute prohibiting guest passenger actions. Here Justice Stone said:

> "We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."

In *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931) (guest passenger case), relying on *Silver*, the Court said "a right of action for a tort to happen in the future is not property, and may be abrogated by the Legislature".

This oft-quoted passage from *Silver* has been quoted within the last year by the Court of Appeals for the Fourth

Circuit in holding under the Federal Drivers Act that "the right to sue a co-worker does not enjoy constitutional protection." *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970).

From the line of cases following *Silver*, it would appear doubtful that the classification here penalizes the exercise of any "constitutional right". Thus, the classification need not be "shown to be necessary to promote a *compelling* governmental interest." *Sapiro v. Thompson*, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969). But even if there was a "constitutional right" to sue the doctor, the classification here would appear appropriate to the state's compelling interest in the health of its citizens.

Isn't the State as concerned with the area of health and doesn't it have as permissible objectives as in those fields? Can't the State limit the remedy in the time-honored manner here when they could abolish it there?

Chief Justice Warren said in *McGowan v. Maryland*, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393, 399 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957), this Court pointed out that "One who assails the classification . . . must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary."

We fail completely to see why the classification made by Maine here is not reasonable. In any event, it would seem

clear this is not the "invidious discrimination" that the Equal Protecton Clause protects against. Petitioner here actually seeks not equal treatment or reasonable treatment but preferred treatment. He who because of his minority had 12 1/2 years (until 2 years after he became 21) in which to bring suit claims that was not enough. The Legislature had the interests of everyone, not just Petitioner, to look after. The question is not how we would classify if we were legislators, but rather whether there is any reasonable basis for their classification. It is not unlikely that wherever lines are drawn and classifications made, someone will suffer. It seems to us that the Maine statute as interpreted by the Supreme Judicial Court of Maine, is well within constitutional authority.

Most of the due process cases Petitioner cites are criminal cases on procedural matters that deal with the question of whether the Fourteenth Amendment incorporates various provisions of the Bill of Rights against actions by the states. None indicates that states have to provide any particular civil remedy. (In fact, it is doubtful if they even say the Fourteenth Amendment requires the states to furnish a civil remedy at all in a matter of this sort.) In any event, it would not seem to be "basic to our free society" that one person be allowed to bring and another person forced to defend an action seventeen years after the act from which it arose occurred.

2. THERE IS NO CONFLICT OF DECISION

As already indicated, there is no conflict of authority whatsoever on the constitutional question. The cases directly in point are unanimously in acccord with the decision of the Court of Appeals here. None of the other cases on related subjects establishes the principle Petitioner urges. Petitioner is here asking this Court at this time to establish a wholly new principle.

3. FEW PEOPLE ARE DIRECTLY AFFECTED BY THE ISSUE PRESENTED BY THE INSTANT CASE

Obviously, this case directly affects only people in the states that have not adopted the "discovery" rule either by

court decision or by statute. Petitioner points out at page 4 that only 16 states still adhere to the "time of the negligent act" rule and "that in many of those states the rule (has) been engrafted with many exceptions . . . ." Presumably, in these states the number of people who with good reason fail to bring suit within the statutory period is quite small. Furthermore, bills have been introduced in some of these states (such as Maine and Massachusetts) to have the legislature enact the "discovery" rule; presumably in the future some will do so. Thus, the number of people who would be directly affected by this is probably very, very small.

4. PETITIONER IS ATTACKING THE VERY FOUNDATIONS OF LIMITATIONS ACTS

So far as we can see, the constitutional door has not been opened to give a person extra time to bring suit because of lack of knowledge but absent fraud or willful concealment. To create a constitutional exception for lack of knowledge would be to inject a wholly new, potentially almost limitless, concept into the limitations field. We are not here dealing with statutory construction as limitations cases normally do.

Unless one were sure a potential claimant was mentally competent, knew he had been injured, knew just how he had been injured and the extent of the injuries and knew the person to sue and the time for doing so, could one ever again rely on a limitations act?

But there is no reason to confine this to personal injury or malpractice actions. What about notice statutes against municipalities or estates of decedents? What about minors? What about adverse possession actions? Is it likely one is going to sit idly by and watch any limitations act run? Isn't he always going to contend lack of knowledge of some sort?

It seems to us that if Petitioner established the constitutional exception for lack of knowledge, a new exception would be forced on all courts for all statutes of limitation or notice cases in all fields. Petitioner here isn't asking this Court just to interpret a statute in a manner to benefit him; he is asking that the Court strike a blow at the heart of limitations

acts, that this Court introduce not a rule of construction or an interpretation but a constitutional doctrine that might revolutionize the limitations field—and, we would allege, quite possibly emasculate it. Yet, he seeks to have this Court now create this revolutionary doctrine in the total absence of any direct authority he can cite. Certainly Petitioner demonstrates no reason or necessity for this Court to now establish such a principle here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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APPENDIX

The following appear to us to be the leading cases from all the jurisdictions that have spoken considering medical malpractice statutes of limitation and the question of discovery; we cannot find even an inference of a constitutional problem in any majority opinion:

Acton v. Morrison, 62 Ariz. 139, 155 P. 2d 782 (1945) (dentist); *Crossett Health Center v. Croswell*, 221 Ark. 874, 256 S.W. 2d 548 (1953); *Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936); *Davis v. Bonebrake*, 135 Colo. 506, 313 P.2d 982 (1957); *Layton v. Allen*, 246 A.2d 794 (Del. 1968); *Burke v. Washington Hospital Center*, 293 F. Supp. 1328 (D.D.C. 1968); *City of Miami v. Brooks*, 70 So. 2d 306 (Fla. 1954); *Silvertooth v. Shallenberger*, 49 Ga. App. 133, 174 S.E. 365 (1934); *Saffold v. Scarborough*, 91 Ga. App. 628, 86 S.E. 2d 649 (1955); *Yoshizaki v. Hilo Hospital*, 433 P.2d 220 (Hawaii 1967); *Billings v. Sisters of Mercy of Idaho*, 86 Idaho 485, 389 P.2d 224 (1964); *Owens v. White*, 380 F.2d 310 (9th Cir. 1967) (applying Idaho law); *Mosby v. Michael Reese Hospital*, 49 Ill. App. 2d 336, 199 N.E. 2d 633 (1964) (Illinois rule later modified by statute); *Guy v. Schuldt*, 236 Ind. 101, 138 N.E. 2d 891 (1956); *Ostojic v. Brueckmann*, 405 F.2d 302 (7th Cir. 1968) (applying Indiana law); *Ogg v. Robb*, 181 Iowa 145, 162 N.W. 217 (1917); *Waddell v. Woods*, 160 Kan. 481, 163 P.2d 348 (1945); *Hill v. Hays*, 193 Kan. 453, 395 P.2d 298 (1964); *Carter v. Harlan Hospital Ass'n* 265 Ky 452, 97 S.W. 2d 9 (1936); *Perrin v. Rodriguez*, 153 So. 555 (La. App. 1934) (dentist); *Springer v. Aetna Cas. & Sur. Co.*, 169 So. 2d 171 (La. 1964); *Tantish v. Szendey*, 158 Me. 228, 182 A. 2d 660 (1962); *Tessier v. United States*, 269 F.2d 305 (1st Cir. 1959) (applying Maine law); *Waldman v. Rohrbaugh*, 241 Md. 137, 215 A.2d 825 (1966); *Capucci v. Barone*, 266 Mass. 578, 165 N.E. 653 (1919); *Pasquale v. Chandler*, 350 Mass. 450, 215 N.E. 2d 319 (1966); *Johnson v. Caldwell*, 371 Mich. 368, 123 N.W. 2d 785 (1963); *Schmitt v. Esser*, 178 Minn. 82, 226 N.W. 196 (1929); *Wilder v. St. Joseph Hospital*, 225 Miss. 42, 82 So.2d 651 (1955); *Laughlin v. Forgrave*, 432 S.W. 2d 308 (Mo. 1968); *Johnson v. St. Patrick's Hospital*, 148 Mont. 125, 417 P.2d 469 (1966); *Spath v. Morrow*, 174

Neb. 38, 115 N.W.2d 581 (1962); *Cloutier v. Kasheta*, 105 N.H. 262, 197 A.2d 627 (1964); *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961); *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963); *Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 248 N.E. 2d 871 (1969); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957); *Iverson v. Lancaster*, 158 N.W.2d 507 (N.D. 1968); *Delong v. Campbell*, 157 Ohio St. 22, 104 N.E. 2d 177 (1952); *Seitz v. Jones*, 370 P.2d 300 (Okla. 1962); *Berry v. Branner*, 245 Ore. 307, 421 P.2d 996 (1966); *Ayers v. Morgan*, 397 Pa. 282, 154 A. 2d 788 (1959); *Wilkinson v. Harrington*, 243 A.2d 745 (R.I. 1968); *Hinkle v. Hargens*, 76 S.D. 520, 81 N.W. 2d 888 (1957); *Bodne v. Austin*, 156 Tenn. 366, 2 S.W. 2d 104 (1928) (Dentist); *Gaddis v. Smith*, 417 S.W. 2d 577 (Texas 1967); *Christiansen v. Rees*, 20 Utah 2d 199, 436 P.2d 435 (1968); *Murray v. Allen*, 103 Vt. 373, 154 A. 678 (1931); *Hawks v. DeHart*, 206 Va. 810, 146 S.E. 2d 187 (1966); *Morgan v. Schlanger*, 374 F. 2d 235 (4th Cir. 1967) (Virginia law); *Ruth v. Dight*, 453 P.2d 631 (Wash. 1969); *Morgan v. Grace Hospital*, 149 W.Va. 783, 144 S.E. 2d 156 (1965); *Reistad v. Manz*, 11 Wis. 2d 155, 105 N.W.2d 324 (1960).